SUPREME COURT, U. S.

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FILED
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JOHN F. DAVIS, CLERK

In the

SUPREME COURT

of the UNITED STATES

October Term 1967

No. 666

Triway Investment Company, an Oregon corporation, and Reuben G. Lenske and Rose M. Lenske, husband and wife,

Petitioners

vs.

State of Oregon, by and through its State Highway Commission, and B. B. Kliks and Convoy Company, an Oregon corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Donald C. Walker, 2314 Lloyd Center,
Portland, Oregon, 97232.
Attorney for Petitioner Triway Investment Co.

Reuben G. Lenske and Rose M. Lenske,
1014 S. W. 2d Avenue, Portland, Oregon 97204
Petitioners pro se.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Oregon rendered May 17, 1967 and reported in Vol. 84 Advance Sheets No. 13, page 869 and its order entered June 13, 1967 denying petition for rehearing.

CITATION TO OPINION BELOW

The written opinion of the Supreme Court of Oregon appears as above set forth and there was no opinion accompanying the June 13, 1967 denial of timely filed petition for rehearing.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC 1257(3).

QUESTION PRESENTED

Did the State of Oregon through its courts deprive petitioners or any of them of "property, without due process of law" and deny them the equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by adjudicating against them without pleadings

having been served upon them and without granting them a fair hearing within the requirements of due process?

STATEMENT OF THE CASE

Until February 21, 1956 Edward H. McCaffrey, Janice McCaffrey and Mildred P. Smith were owners of the property in Portland, Oregon which the Oregon State Highway Commission took under its power of eminent domain on February 8, 1966. (Ex 1 and Appellants' Abstract of Record 7) Kliks obtained a judgment against Edward McCaffrey on September 12, 1955 and(Ex 1, 2, 3) Convoy Company obtained a judgment against Edward McCaffrey and Janice McCaffrey on March 28, 1957. Neither Kliks nor Convoy Company had a judgment against Mildred P. Smith or any of the petitioners. By mesne conveyances petitioners became record owners and possessors of the property and were the owners in possession when the Oregon State Highway Commission commenced the condemnation action on January 25, 1965 and when the judgment of condemnation was entered on February 8, 1966 (App. Ab. of Rec. 2, 7.)

Without any pleadings of any kind showing the claims of Kliks or Convoy Company having at any time been served or exhibited to petitioners or any (CR
of them an abortive hearing was held in the Circuit (Tr
Court of the State of Oregon for the County of Multnomah and that court ordered all of the money available for distribution (after deducting attorney fees and county taxes) to be paid to Kliks and Convoy Company without designating the amounts to be applied to the respective judgments and without granting any subrogation rights to petitioners or any of them. (Ab. of Rec. 10).

Petitioners' title stemmed from two sources, the conveyance from the McCaffreys and Mildred P. Smith on February 21, 1956 and the purchase by Reuben G. Lenske of the major portion of the property at a foreclosure sale of a city lien on January 20, 1956, followed by his payment of the mortgage on the property and taxes. (Ex 1, 4 and Ab of Rec. 15-25)

REASONS FOR GRANTING THE PETITION

1. No pleadings showing the claims of respondents Kliks and Convoy Company were ever served or exhibited to them up to and including the date of the order distributing to respondents. See

Clerk's record, including his certificate which says, "In all cases where there was certificate or affidavit of service, said certificate or affidavit has been included herein."

2. No notice of a hearing was ever served or otherwise given to petitioner Rose M. Lenske; not was there any waiver by her or anyone on her behalf; nor did she appear in person or by attorney.

3. No notice of the hearing of February 17, 1966 was served or given to Reuben G. Lenske by respondents.

4. Respondents misrepresented to the court the status of the record as to service of notice on petitioners and the court was therefore under a misapprehension in relation thereto. (App. Reply Br. 13-15)

5. There was no hearing that would meet the standard generally conceded as essential to meet the requirements of due process under the Constitution. (Tr, consisting of only 30 pages)(Also App. Reply Br. 19-22)

6. Besides Kliks and Convoy Company failing to serve petitioners with essential pleadings and notices, the Oregon State Highway Commission failed to serve

petitioners with essential pleadings excepting only the original complaint. The findings and decree were not served. (Clerk's Record 15)

7. No findings, conclusion and judgment relating to the distribution of the money were served on petitioners nor were they given ten days within which to object to them, as required by the rules of the court but the order of distribution was signed then and there on February 17, 1966 without service on petitioners or exhibiting it to petitioners or any of them (Rose M. Lenske was not present nor was attorney for Triway Investment Co.) See App. Reply Br. 26, App. Ab. of Record 10 and the transcript consisting of only 30 pages. Also pet. for rehearing.

8. Petitioners are right on the merits in both law and equity as to the whole of the money but at the very least are entitled to that portion of the value of the property represented by the former interest of Mildred P. Smith against whom respondents had no judgment; and petitioners are entitled to subrogation as to any judgment lien on account of which their property is being taken.

The trial court's order, with comments in parantheses by petitioners, is as follows:

"It appearing to the court upon motion of the defendants, Convoy Company, B. B. Kliks and Multnomah County Oregon (The motion wasn't accompanied by an affidavit or other sworn statement served upon petitioners that constituted a pleading having a basis on which petitioners could meet their contentions) and from the record and hearing in the above entitled matter, that the State of Oregon has deposited in the Registry of the court the sum of $5750.00 as compensation for the taking of the real estate described in the complaint herein, together with the sum of $250.00 attorneys' fees;

It further appearing to the court that all interested parties have been duly notified (there was nothing of record on February 17, 1966 showing notice to any of petitioners; furthermore Judge Paul R. Harris, before his death, corrected the record which voids the effect of this recital) of the hearing concerning the moving defendant's motion set by the court February 17, 1966 at 10:45 A.M.;

It further appearing to the court, being fully advised of the premises herein, that the moving defendants are entitled to said sum,

THEREFORE, it is considered ordered and adjudged, that the Clerk of the court distribute said funds as follows: The sum of $166.68 to Multnomah County for taxes due said county and the balance of said sum to be made jointly payable to the defendants, Convoy Company, an Oregon corporation, and B. B. Kliks. (No determination of the interest of Kliks" judgment debtor Edward McCaffrey or any subrogation rights, no determination of the rights of Edward and Janice McCaffrey against whom Convoy Company later acquired judgment, and no determination of the interest of Mildred P. Smith against whom neither had a judgment at any time and who took title with the McCaffreys and who deeded to petitioner's predecessor.)

Dated at Portland, Oregon this 17 day of February, 196

Paul R. Harris
Judge"

The opinion of the Supreme Court of Oregon, with petitioners' comments in parentheses, and which appears in Vol. 84 Oregon Advance Sheets, No. 13, page 869, follows:

"PER CURIAM.

In a condemnation proceeding concerning land that was encumbered by various liens which exceeded the value of the land, the State Highway Commission paid into court the established value of the taking, and this contest proceeded between the various lien claimants (Wrong, petitioners were owners, not lien claimants). Three of the claimants appeal an order disbursing the proceeds to two claimants whose liens appear to be senior. (Wrong, the record shows conclusively that respondents had no rights of any kind against the interest previously held by Mildred P. Smith. Also, on the record and the undisputed evidence, under Oregon law not changed by the Oregon Supreme Court in this opinion, those judgment creditors had no right in the property or proceeds)

The trial court record shows that all interested parties were notified either in person or through their attorneys of record and had an opportunity to be heard (Wrong, record showed no notice on February 17, 1966 to any of petitioners and Rose M. Lenske did not appear in person or by attorney) and had an opportunity to be heard at the time a determination was made with reference to the priorities of the various claimants. (Even Reuben Lenske, who had received no notice but happened to be in the court room, had never been served with anything on the part of respondents Kliks and Convoy Company) The principal questions were questions of fact. (Wrong, the essential facts were not controverted insofar as petitioners' rights were concerned) The trial court resolved conflicts between recorded instruments and verbal testimony in favor of the written records. (Wrong, the recorded instruments showed superior rights in petitioners and petitioners were not given the right to present their testimony). We have examined the record and find no reason for deciding the priorities in a manner different from those established by the trial court. (The court failed to express an opinion on

any of the legal questions presented in the briefs or to touch upon the constitutional issue of due process) Affirmed."

The constitutional issue was raised before the trial court in the affidavit of March 9, 1966 (CR 31) and before the Oregon Supreme Court on pages 37-48 of Appellants' Brief and on page 12 of Appellants' Reply Brief and in the Petition for Rehearing.

CONCLUSION OF REUBEN G. LENSKE

Perhaps the aberration of the courts of Oregon in making short shrift of me and $5750 may be gleaned from the litigation cited in the Petition for Rehearing. For the court's convenience I am including in the record the slip opinion of the Circuit Court of Appeals rendered August 28, 1967 in one of the cases and, as the other one is in the U. S. Supreme Court records, I suggest that the court examine File No. 1158, Lenske v. Oregon et al., 384 U.S. 943, May 16, 1966. I suppose that a prime reason for my asking for certiorari is that the denial of due process and equal protection happened to me and hurt my pocket book and my pride. But my specific interest does coincide with the public interest for that which is done constitutionally wrong with the least of citizens is being done vicariously to all others.

Respectfully submitted,

Reuben G. Lenske for M. Lenske — Pro se

Atty for Triway Invest. Co.

APPENDIX

Excerpt from Clerk's Record, 45.

"...it is ordered that the Findings of Fact, Conclusions of Law and Judgment entered herein on February 8, 1966 be and are hereby amended to conform to the record, and the portion thereof stating: 'the defendants Triway Investment Company and Reuben Lenske and Rose Lenske, husband and wife, appearing by and through Frank W. King, their attorney"

be and is hereby deleted and the following is substituted in lieu thereof:

"defendant Triway Investment Company appearing by Frank W. King, its attorney"

It is further ordered that this order amending and correcting said Findings of Fact, Conclusions of Law and Judgment be and is entered herein nunc pro tunc as of February 8, 1966, on this 3d day of May, 1967.

Paul R. Harris
JUDGE"

COMMENT

This correction was made before the trial judge's untimely death. It was on file with the Oregon Supreme Court before the date of oral argument. That court's per curiam opinion ignores the effect of this correcting order on notice to the parties or their appearance or their representation.